Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1999

James Franklin Gibson,
James Edward Norris,
Pro Per

Petitioners

v.

Federico Pena, Secretary
Department of Transportation

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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39pp

QUESTIONS PRESENTED

1. Whether Petitioner's rights under the Free Speech clause of the First and Fourteenth Amendment were violated by the Defendant's actions of retaliation when the Petitioner spoke out on a matter of public concern, racial discrimination, being enacted against a fellow federal employee, co-petitioner, James E. Norris, at the Federal Aviation Administration Flight Standards District Office in Los Angeles, by the Defendant.

2. Whether the lower court erred when it did not require the Defendant to answer Plaintiff's request for discovery and first set of interrogatories, which would have fully developed factual issues involving the Defendant's motivation of racial animus, and, which violated the plaintiff's rights of due process, before granting the defendant Summary Judgment.

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INTRODUCTORY PRAYER

The Petitioners James F. Gibson and James E. Norris pray that the Supreme Court grant a Writ of Certiorari to review the judgment of the court.

OPINIONS BELOW

A. Constitutional Provisions.

B. Title VII of the Civil Rights Acts of 1964 and the Civil Rights Act of 1991.

C. Federal Rules of Civil Procedure, Rule 56 (C) and (F), 28 U.S.C.A.

D. Copy of lower court decision, Sept. 30, 1996.

E. U.S. Court of Appeals for the Ninth Circuit, July 23, 1998.

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N. FAA Medical Certificate Revocation, Sept., Oct. 1990.

O. Aviation Safety Inspectors who failed out of the Academy.

P. Statement from Denver FSDO Supervisor, John Keller.

Q. Testimony from FAA Academy Supervisor, Lindsey 'Pete' Helquist.

LIST OF PARTIES

Federico Pena, Sec. of Transportation, Defendant Appellee

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit, was entered on July 23, 1998. The Court of Appeals denied a timely petition for rehearing en banc on February 17, 1999.

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTES, CONSTITUTIONAL PROVISIONS AND RULES

The text of the following authorities relevant to the determination of the present case are set forth in the appendix; United States Constitutional First and Fourteenth Amendments, Title VII of the Civil Rights Act of 1964, and the Federal Rules of Civil Procedure - Rule 56 (C) & (F).

A. The First Amendment of the Constitution protects individuals against federal government infringements on free speech. Free speech is a liberty protected against infringement by the due process clause of the Fourteenth Amendment.

B. Title VII of the Civil Rights Act of 1964.

C. Federal Rules of Civil Procedure, Rule 56 (C) & (F).

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STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Act of 1972, 42 U.S.C. §1331(general federal question jurisdiction).

The following statement of this case will truthfully state and/or summarize the pertinent facts related to this case, and, will be accurately referenced to the record still in the possession of the lower court.

Petitioner James F. Gibson was employed by the Federal Aviation Administration (hereafter, FAA) as an Aviation Safety Inspector and assigned to the Flight Standards District Office (hereafter, FSDO) in Los Angeles, California (hereafter, LAX)on July 1, 1988. Within a few days after he had reported for duty to the LAX FSDO, he began hearing strong racial remarks and observing racial actions being made against another FAA Aviation Safety Inspector at the LAX FSDO, co-petitioner James Edward Norris. These remarks and actions against James Norris, were based entirely on the fact that he was an African-American, and nothing else. Norris' work and attendance record, conduct and background record were excellent, however, the FAA Aviation Safety Inspector who was in charge of Gibson's training, Mr. Jerry Parrott, and, the LAX FSDO operations supervisor, Mr. Robert Bebout, were totally motivated and driven to have Norris terminated, for no other reason than his race.

By the end of July 1988, newly appointed LAX FSDO manager, Mrs. Bonnie Pankella, assigned Gibson to take Inspector Norris to a local Fixed Base Operator in the Los Angeles

area and give him "refresher training" in Instrument Procedures. This was because Mrs. Pankella realized that Norris was lacking in recency of experience, because he had been flying very little since his arrival at the LAX FSDO in April of 1988.

During the first month that petitioner Gibson was in the LAX FSDO petitioner Norris' flight skills were a common topic of conversation between Mr. Bebout, Mr. Parrott, and another inspector in the office, Mr. Claire Milton, and, always included harsh racial overtones. However, Mr. Bebout and Mr. Parrott were never considering giving Norris any "refresher training," to bring his flight skills up to par. The plan to give Norris "refresher training" at a Fixed Based Operator in LA was suggested by Mrs. Pankella.

When Gibson and Norris returned from this refresher training, some several hours later, Gibson was told by Mr. Bebout to report to Mrs. Pankella's office, and Norris was told to return to his desk. Gibson went into Mrs. Pankella's office with Mr. Bebout and was told to shut the door and sit down. Mr. Bebout then looked at Gibson and pointedly asked, "how did he do?" Gibson then explained to Mrs. Pankella and Mr. Bebout, which procedures he and Norris had been practicing, and, explained that Norris "only" needed some additional training to bring his flying skills up to par, however, Mr. Bebout flew into a rage, jumped up out of his seat, and stormed out of the office. Mrs. Pankella seemed to be totally unaware of what was going on with Mr. Bebout, and, obviously knew nothing of Mr. Bebout's and Mr. Parrott's racial motives toward Norris.

Mr. Henry Polchow, a long time LAX FSDO Aviation Safety Inspector (Airworthiness) testified under oath to an EEO Investigator,

in a complaint filed by Mr. Norris, that a day after this incident in Mrs. Pankella's office, he overheard Mr. Bebout threaten Gibson in the hallway by telling him, "I'll get you for that." (In reference to the record and enclosed) Mr. Polchow also testified that he learned from another inspector, the next day, that the reason why Mr. Bebout had threatened Gibson was because Gibson had told Mrs. Pankella that Norris was trainable and only needed refresher training. This was in complete contradiction to what Mr. Bebout and Mr. Parrott had been telling Mrs. Pankella.

Gibson went to the Administrative Officer of the LAX FSDO, Mrs. Donwyn Elder, and told her about what was going on with Mr. Bebout and Mr. Parrott, and, that he would like to speak with Mrs. Pankella. After Mrs. Elder spoke to Mrs. Pankella, Gibson was told to come to her office. He told her the complete story about what had been going on with Mr. Bebout and Mr. Parrott, and, their racist remarks, actions and attitude toward Norris, however, Mrs. Pankella refused to believe that Mr. Bebout or Mr. Parrott thought that way about Norris and dismissed Gibson's verbal complaint to her.

By this time Gibson was not too well thought of by Mr. Bebout and/or Mr. Parrott and his training abruptly ended. Because Gibson was a probationary employee and had not completed one year of Federal Civil Service, he could be terminated for any reason or for none at all. Mr. Bebout and Mr. Parrott then began convincing Mrs. Pankella that Gibson was "untrainable" and should be terminated.

See Rankin v. McPherson (1987, US) 97 L

Ed 2d 315, 107 S CT 2891.[1]

Gibson had very successfully completed two FAA 40.40 Aircraft Rental check rides at the LAX FSDO, one in a single engine Cessna 220, and, the other in a multi-engine Cessna 340, given by FAA Inspector John Roach; taken and successfully completed several FAA correspondent courses; and, had volunteered everyday for "Standby Duty" in the office. However, on January 3, 1989 Gibson was called into Mrs. Pankella's office, and, with Mr. Bebout present, terminated-effective that day. Gibson had an unblemished record in the field of aviation with over 8,500 hours total flight time, and, over 6,000 hours as a FAA Certified Flight Instructor, plus excellent references and letters of recommendation as a pilot/instructor.

A few days after the termination, Gibson filed a formal EEO Complaint on January 23, 1989, alleging retaliation and reprisal by the Agency based on his first termination, however, both the Divisional Manager of Flight Standards, Mr. William Williams, and the Manager of the FAA Western-Pacific Region Civil Rights office, Mr. Vincent Jourbert had told Gibson that because he was a probationary employee, having not completed one year of employment, he could not file an EEO complaint under any circumstances against the Agency. Both Mr. Williams and Mr. Jourbert tried to dissuade Gibson from attempting to file an EEO Complaint, however, the FAA's headquarters in

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[1] "A state may not discharge an employee on a basis that infringes upon that employee's constitutionally protected interest and freedom of speech, even where the employee is probationary and thus could be discharged for any reason or none at all." Rankin v. McPherson (1987, US) 97 L Ed 2d 315, 107 S CT 2891.

Washington, D.C. disagreed and told Mr. Jourbert that Gibson could file a complaint alleging retaliation and reprisal for having opposed unlawful racial actions. An investigator was assigned and over the next several months an investigation was conducted. By August 1989 the investigation and interviews had been completed, which proved that Mr. Bebout's assessment that Gibson was "untrainable" was completely false and without foundation, and, that these actions had been taken because Mr. Bebout had withheld all training from Gibson. This was directly attributable to the fact that Gibson opposed what Mr. Bebout and Mr. Parrott were doing to Norris. Mr. Bebout and Mr. Parrott were obsessed with their campaign to get Norris and the "N" word was used very frequently around the office, as well as other racial gestures and actions. FAA Inspector, Mr. Claire Milton, a close associate of Mr. Bebout and Mr. Parrott, would frequently sneak up behind Norris as he was standing in the hallway, and make gestures, with his hands and arms, simulating a "gorilla," he always referred to Norris by the 'N' word. All of these "activities" by Mr. Bebout, Mr. Parrott, and Mr. Milton were a constant disruption to the efficient operation of the LAX FSDO.

Absolutely no discipline, nor conduct problems were ever alleged against Gibson or Norris while they were employed by the FAA.

In early September 1989, after Gibson had talked to the Equal Employment Opportunity Commission (hereafter EEOC) field office in Phoenix, Arizona, and was advised to file a civil action in U.S. District Court, he called the FAA Civil Rights office in Los Angeles and told Mr. Jourbert that he was going to file a civil action in district court. Mr. Jourbert immediately said that he had a settlement

offer coming and would send it to him right away. The settlement offer called for reinstatement, full back pay, benefits, etc., however, Gibson was told he would be transferred to the Fresno, CA FSDO, and, not to the FSDO in his hometown - Reno, Nevada. This transfer location was for absolutely no given reason, as the FSDO in Reno, Nevada had Inspector openings as well. (A plausible explanation has never been given as to why he had to be assigned to the Fresno FSDO and not assigned to the FSDO in Reno, where he and his family lived.) Not only was he required to maintain living accommodations in Fresno, as well as in Reno for his family, he was also required to make the 600 mile round trip to Reno every weekend to be with his family. Gibson opposed this reassignment location because there was absolutely no reason why he had to be separated from his family, other than further harassment, however, he went ahead and accepted the settlement, and, reported to the Fresno FSDO on September 23, 1989.

One of the primary reasons why Gibson objected to the reinstatement location, was because the manager of the Fresno FSDO, Mr. Edward Hammonds, had previously been the acting manager of the LAX FSDO, until just prior to Gibson's assignment date to the LAX FSDO on July 1, 1988, and, Mr. Hammonds was fully aware of the "situation" going on between Mr. Bebout, Mr. Parrott and Mr. Norris, and he, Mr. Hammonds had contempt for Mr. Norris.

As soon as Gibson reported for duty at the Fresno FSDO on September 23, 1989, Mr. Hammonds made it perfectly clear that he, Gibson, was not welcomed at the Fresno FSDO. He was assigned to a "non-office" room in the back of the building away from the other

Inspectors.

By March 1990 Gibson had successfully completed over 80% of his On-the-Job Training (hereafter OJT) program, (In reference to the record, copy enclosed) had very successfully completed his Performance Evaluation Program (probationary), (In reference to the record, copy enclosed)and, had been conducting Certified Flight Instructor Airplane and Instrument Check Rides, Part 135 (Airtaxi) VFR and IFR Check Rides, and, Designated Examiner Check Rides, all very successfully. (In reference to the record)

In March 1990, just after Gibson received an excellent Performance Evaluation rating which signified a completion of his probationary program he filed a second request for a "hardship transfer" to the Reno FSDO, or to just some FSDO in Northern California, closer to his home in Reno. However, he was told by Mr. Hammonds and Mr. Gibbons that he would have to complete one year at the Fresno FSDO, and, he would have to complete the FAA Academy. This was totally contrary to Rules and Regulations pertaining to a Federal Civil Service Employee's request for a "hardship transfer." Completion of one year at Fresno FSDO and/or completion of the FAA Academy, was not a stipulation of the settlement agreement from Los Angeles, and, was in opposition to regulations pertaining to a "hardship transfer" request.

Several other FAA Aviation Safety Inspectors at the LAX FSDO, with less time in service, had requested a hardship transfer out of the LA office to their hometown, and all were approved, as soon as possible. Gibson was told by many FAA inspector acquaintances at the LAX FSDO, and the Fresno FSDO that, "if they didn't get you at the LA FSDO, they'll get you at the Academy in Oklahoma City."

In Mid-April 1990 Gibson was told that he was scheduled for the May 9, 1990 General Aviation Indoctrination Class at the FAA Academy in Oklahoma City. Gibson's classroom test scores were excellent and he was progressing well in the simulator sessions of jet evaluation.

Gibson's first instructor at the academy, Mr. James Aadland, would not sign him off in an aircraft (supercub) which he had many hours of experience as a pilot and/or instructor, and there was conflict between the two. It was later learned that Mr. Aadland and Mr. Bebout, the operations supervisor at LAX FSDO whom had been directly responsible for Gibson's first termination, had been close personal and professional friends before and during <u>their tour of duty together</u> at the Fargo, North Dakota FSDO.

On May 25, 1990, the supervisor of flight training at the FAA Academy, Mr. Lindsey "Pete" Helquist, scheduled a phase check in a single engine aircraft and requested maneuvers that were all performed very well, however, Gibson was taken back to the airport and told to report to Mr. Helquist's office. Mr. Helquist refused to allow him any additional training, and, failed him out of the Academy. He was told to report back to his home office in Fresno.

When Gibson arrived back in Fresno and reported for duty on May 29, 1990, he was immediately called into Mr. Hammonds' office, told that he was being removed from <u>all</u> duties as a FAA Aviation Safety Inspector, told to turn in his Fresno FSDO office front door keys, and Fresno Airport badges. His name was removed from the office duty roster, and his picture removed from the staff board. He was then told to return to his office until, "we figure out what to do with you." The next day

Gibson was told to move out of his office, into a cubical area without a telephone, and was specifically told, "do not use the telephone." He was then assigned to the duty of making copies of papers for other Inspectors, assembling new furniture for the office, and, doing any other type of menial jobs. Gibson was never offered any flight training for a return to the Academy, and, Mr. Gibbons never offered to fly with Gibson, even though this was standard operating procedures for the Operations Supervisor of a FSDO. Mr. Hammonds took Gibson outside of the building, on several occasions, and told him, "you will not be sent back to the Academy, and, you'd better check your options."

In a memo to the Western-Pacific Region on June 15, 1990, (In reference to the record) Mr. Hammonds told the Region, "I do not recommend that Gibson be given any additional training, or returned to the Academy for another class."

On June 17, 1990 (In reference to the record) Gibson was issued a letter informing him that a '609' (reexamination check ride) under the FA Act of '58, would be conducted on July 17, 1990. This was for no probable cause, and even the petitioner's supervisor, Mr. Clifford Gibbons, told him that, in over 15 years with the Agency, he, Mr. Gibbons, had only known of one other FAA Inspector who had been '609'd', (reexamined) and he, the other Inspector, had crashed an airplane. Mr. Gibbon's commented several times during this period that he, "didn't know why Hammonds is doing this."

Mr. Hammonds refused to tell Gibson the name of the check airman, and from which FSDO he was coming, and, refused to allow Gibson to take the '609' check ride at a FSDO or Region of his choice. (The choice of the location of

the '609' check ride is a right given in regulations and contained in the FAA Aviation Safety Inspector's handbook.) (In reference to the record) Gibson even offered to take the '609' check ride on his own vacation time in Reno, at no cost to the Agency, but Mr. Hammonds strongly refused.

When Mr. Hammonds' actions and motives became extremely suspicious and questionable, Gibson went to his supervisor and asked to be allowed to talk to a "counselor or therapist" at his medical-carrier, Kaiser-Permanette in Fresno. Mr. Gibbons then called Mr. Hammonds and told him of Gibson's request, and, Mr. Gibbons also called the Flight Surgeon of the Western-Pacific Region, Dr. Stephen Goodman, and told him of the request to talk to a therapist.

In an affidavit from Dr. Stephen Goodman (In reference to the record and enclosed) dated November 1, 1990, Dr. Goodman stated that Mr. Hammonds had been calling him, even before Gibson had requested to talk to a therapist, and, telling him that Gibson was acting "erratic" around the office, had requested time off to see "his psychiatrist", and, admitted that he was seeing a "psychiatrist." This was all a complete lie, however, Dr. Goodman never made any attempt to contact Gibson, either in person or by telephone before he started procedures to "revoke" Gibson's FAA medical Certificate. Dr. Goodman also alleged in the Revocation Order that, "By Virtue of your psychiatric history of delusional (paranoid) disorder, persecutory type ....," that he was revoking Gibson's FAA medical certificate. These charges were completely false and highly slanderous.

Gibson's attorney at that time called the Western-Pacific Region and insisted that

Gibson be examined by a Board Certified Psychiatrist. The Agency finally agreed and in November 1990, Gibson was seen in San Francisco by Board Certified Psychiatrist, Dr. Kenneth Gottlieb. After approximately thirty minutes in Dr. Gottlieb's office, he said, "Mr. Gibson, you don't need a psychiatrist, you need an attorney." In Dr. Gottlieb's ten page report to the FAA Western-Pacific Region Flight Surgeon, Dr. Stephen Goodman, he found absolutely no substance nor validity to the charges made against Gibson. (In reference to the record and enclosed)

On November 9, 1990 Administrative Law Judge F. Lamont Liggett of the Merit Systems Protection Board, San Francisco region, issued a "Stay" of the FAA's action to reexamine all of Gibson's FAA Airman Certificates under the FA Act of '58. Judge Liggett found that because Mr. Hammonds had been Acting Manager of the LAX FSDO, and was well acquainted with all of the personnel of that office, and, because of the retaliatory actions which had been perpetrated against Gibson, he was "Staying" the Agency's actions to reexamine Gibson's FAA Airman Certificates. (In reference to the record and enclosed)

In December 1990 the Federal Air Surgeon/Chief Psychiatrist of the FAA in Washington, D.C., Dr. Pakull, returned Gibson's FAA Medical Certificate.

However, on April 5, 1991, Gibson was terminated for the second time, and, on this very same day, an "Emergency Order of Suspension" of Gibson's FAA Airman Certificates was issued by the Assistant Chief Counsel of the Western-Pacific Region, Mr. DeWitt Lawson. Gibson had allegedly failed out of the Academy, and, had allegedly been "insubordinate," by allegedly refusing to take the '609' check ride. Gibson never

refused to take the '609' check ride, but only asked to be allowed the same privileges and/or rights as any other FAA Airman - to have a choice of where the check ride would be given and with whom.

Shortly after Gibson's second termination on April 5, 1991, and, because he was having major problems finding employment in the field of aviation, he made application for California State Unemployment Insurance benefits. The FAA immediately objected to the unemployment claim, that Gibson's stated reason for being terminated was in "retaliation," and, a hearing was scheduled for October 9, 1991, before Administrative Law Judge A.D. Evans of the California State Unemployment Insurance Appeals Board. The Agency called their witnesses to testify and Gibson testified in his own behalf. The decision by Judge Evans (In reference to the record and enclosed) overwhelmingly supported Gibson's charges of retaliation. Following an appeal to the Merit Systems Protection Board, of the second termination on April 5, 1991, Gibson was scheduled for a hearing in September 1991. The defendant was allowed to call any and all of their witnesses, however, Merit Systems Protection Board Administrative Law Judge Lon Bartholomew of the San Francisco region told Gibson that he would not be allowed to call any of his witnesses. Judge Bartholomew also refused to hear all of the evidence related to discrimination, and, to explore the retaliatory factors of the appeal.

On July 31, 1992 Gibson received a "Notice of proposed Certificate Action" from the Assistant Chief Counsel's Office at the Western-Pacific Region in Los Angeles, informing him that if he did not take the '609' check ride by August 14, 1992, fifteen

(15) days later, at a FSDO selected by the Agency, and, with a check airman of their choice, his certificates would be revoked. This was absolutely for no "probable cause", was highly unprecedented, and retaliatory.

It must be remembered that neither Gibson nor Norris had violated any rule, regulation, or law pertaining to conduct, job performance, duty or behavior at the LAX FSDO, or at the Fresno FSDO. Norris attended the FAA Academy after Gibson had been terminated, the second time, and very successfully passed the program with excellent grades.

Gibson immediately filed an appeal of the Revocation Order to the National Transportation Safety Board and a hearing was scheduled for December 1992 in Gardena, California. He retained an attorney, however, a conflict in the attorney's calendar, and, the National Transportation Safety Board's hearing date occurred, and a change of the hearing date was requested. A new hearing date was set for February 19, 1993, however,. in December 1992, Gibson spoke to the Administrative Law Judge assigned to this revocation hearing, and was told by him that he would not be allowed to call any witnesses. After this conversation with the Administrative Law Judge of the NTSB Gibson realized that he didn't have a chance of retaining his certificates at the Revocation hearing, so he begged and borrowed what money he could, maxed out his credit cards, and drove to the Northwest Region to take the check ride. He employed a FAA certified Flight Instructor for the refresher training, and, on February the 5th, 6th & 8th, 1993, took the check ride in Casper, Wyoming with FAA Inspector/Supervisor, Mr. Burl Hardesty, from the Denver FSDO. The check ride and reexamination by Inspector Hardesty, was as

thorough as it could have possibly been, and involved an examination of every maneuver in the Commercial, Flight Instructor, and Airline Transport Pilot's FAA Flight Test Guides.

Mr. Hardesty's letter to the Region (In reference to the record and enclosed) dated February 10, 1993 stated that Gibson had "met or exceeded all of the requirements for the FAA's Commercial Pilot's Certificate," and, "met or exceeded all of the requirements for the FAA's Airline Transport Pilot Certificate." Mr. Hardesty also reinstated Gibson's FAA Certified Flight Instructor Certificate and stated that he could not understand how the agency could justify a '609' of Gibson's FAA Airman Certificates.

The appeal of Gibson's termination on April 5, 1991 to the Merit Systems Protection Board was decided in favor of the defendant - after no investigation, and no witnesses, by the MSPB or the EEOC.

On July 29, 1992, appellant filed a civil action, #CV-92-4522 WDK, in U.S. District Court for the Central District of California, alleging retaliation and reprisal for having openly opposed the racial actions of his supervisor and training officer at the LAX FSDO, for having filed an EEO Complaint - #89-65, on January 23, 1989, and, for having been terminated, in retaliation, the second time on April 5, 1991 by the manager of the Fresno FSDO.

July 17, 1996 was the date assigned by the court for discovery cutoff of this civil action. Co-Plaintiff James E. Norris sent by first class mail two copies of the Plaintiff's "Request for Discovery and First Set of Interrogatories": one to the Assistant U.S. Attorney, Ms. Sara Robinson, and the other to the Clerk of the U.S. District Court in Los Angeles, several days prior to this cutoff

date. However, Ms. Robinson stated in her Appellee's Brief, that she had not received her copy of the Discovery Request "timely", and, therefore was not going to answer the Discovery. The clerk of the U.S. District Court in Los Angeles reported that they received their copy - "timely," however, Assistant U.S. Attorney, Sara Robinson, whose office is right across the street from the United States Courthouse in LA, claims not to have received her copy - "timely." There was no reason why the plaintiff would not have wanted to have their Discovery request received on time.

Plaintiff's Gibson and Norris never had Discovery, and, were never allowed to call any witnesses to testify in their behalf, before a summary judgment was granted, and, consequently, were denied due process.

On September 30, 1996 (In reference to the record and enclosed) Honorable U.S. District Court Judge W.D. Keller issued an order granting Summary Judgment to the Defendant of cases CV-92-4522 WDK and CV-94-7069 WDK (consolidated). This order held that "Gibson and Norris failed to produce specific, substantial evidence of pretext."

On May 6, 1997 Gibson and Norris individually submitted their appeal of the Summary Judgment Order to the United States Court of Appeals for the Ninth Circuit. A memorandum was issued on July 23, 1988 affirming the decision of the lower court. The United State Court of Appeals for the Ninth Circuit held that, "Gibson and Norris' evidence of a causal connection consists of mere allegation and speculation." Appellant Gibson and Norris filed a request for a rehearing En Banc, however, on February 17, 1999, this request was denied.

REASON FOR GRANTING THE PETITION
(Argument)

The evidence of pretextual motive, related to petitioner Gibson's dismissal for the second time on April 5, 1991, is very evident and clear when the Court considers the proven facts, that the Petitioner was terminated the first time on January 3, 1989, following "proven protected activities" of which the employer was aware, and, the second time on August 5, 1991 because of numerous personnel actions which the manager of the Fresno FSDO, Mr. Edward Hammonds, took against him before and after he filed an EEO Complaint on June 17, 1990. This EEO Complaint alleged retaliation and reprisal related to the '609' reexamination action being taken against him.

FREEDOM OF SPEECH VIOLATION

Every personnel action by the defendant taken against the petitioner Gibson at the LAX FSDO in 1988 and 1989, and, at the Fresno FSDO in 1989, 1990 and 1991 were a direct result and consequence of his having evaluated James Norris' piloting skills positively rather than negatively, as Mr. Bebout had wanted. When he reported this to the manager of the LAX FSDO, Mrs. Bonnie Pankella, this report infuriated Mr. Bebout who then initiated major acts of retaliation against he petitioner, and, which directly led to his first terminations on January 3, 1989, following "protected activities" of which the defendant was aware. Numerous personnel actions of retaliation occurred after Gibson was reinstated and assigned to the Fresno FSDO, and, these actions continued until his second termination on April 5, 1991. These personnel actions were a direct consequence of his having spoken out about the unlawful racial actions, which were occurring at the LAX FSDO and for having filed an EEO Complaint against the manager of

the Fresno FSDO, Mr. Edward Hammonds, on June 17, 1990.

Mr. Hammonds was directly responsible for making false reports to the Flight Surgeon of the Western-Pacific Region, and, having Gibson's Medical Certificate revoked; removed from all duties and training; issuing a '609' reexamination of his FAA Airman Certificates; and, terminating him on April 5, 1991.

Plaintiff was discharged following these protected activities, of which the employer was aware, and, this establishes a prima facie case of retaliatory dismissal. (See Aquira v. Chula Vista Sanitary Services, 542 F2d 779 13FEP 1436 (9th Cir. 1976)[2]. The decision by the lower court in CV-92-4522-WDK and CV-94-7069-WDK is in conflict with the decision of Aquira v. Chula Vista Sanitary Services which held that the plaintiffs had not established a prima facie case.

The lower court held in the Minute Order decision on September 30, 1996 that, "a prima facie case is not enough to survive Summary Judgment. ID Gibson must present some evidence that the defendant's proffered reason for dismissal is pretextual."

It has been noted that, under the Hochstadt adaptation of the McDonald Douglas prima facie pattern of proof to retaliation cases, evidence tending to prove pretext is almost inevitably introduced as part of the plaintiff's prima facie proof.

See also "Texas Department of Community

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[2] "A showing by the Plaintiff that he was discharged following protected activities of which the employer was aware establishes a prima facie case of retaliatory dismissal." Aquira v. Chula Vista Sanitary Services, 542 F2d 779 13FEP 1436 (9th Cir. 1976).

Affairs v. Burdine, 450 US 248, 253, 101 S CT. 1089, 1093. 67 L Ed 2d 207 (1981)[3]

Not only was the defendant very much aware of petitioner Gibson's protected activity of expression at the LAX FSDO in 1988 and 1989, the Defendant was also very much aware that Gibson had filed an EEO Complaint, alleging retaliation and reprisal, in June 1990, against the Manager of the Fresno FSDO, Mr. Edward Hammonds. This complaint was based on the retaliatory actions of the manager of the Fresno FSDO, Mr. Hammonds, when he issued Gibson a '609' reexamination letter of intent on June 17, 1990, for "no probable cause," other than for alleging failing out of the FAA Academy.

After Mr. Hammonds had issued a '609' action against the petitioner, Gibson filed an EEO Complaint alleging retaliation and reprisal by the defendant because of the initial opposition to unlawful racial actions, which petitioner had made at the LAX FSDO, for having been failed out of the FAA Academy by the defendant, '609'd' (reexamined), and for having his FAA Medical Certificate revoked. All of these actions were leading up to the petitioners eventual termination from the FAA, the second time, and, which would have ruined his career in the field of aviation.

The lower court decision which granted Summary Judgment, is in direct conflict with the decision of the United States Court of Appeals for the Ninth Circuit in Aquira v.

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[3] "In order to show a prima facie case of discrimination, a plaintiff must offer evidence that gives rise to an inference of unlawful discrimination." Texas Department of Community Affairs v. Burdine, 450 US 248, 253, 101 S CT. 1089, 1093. 67 L Ed 2d 207 (1981).

Chula Vista Sanitary Service in 1976, and, in conflict with other Circuit Court decisions in reference to pretextual motive and retaliatory dismissal. (See Rainey v. Vinson Guard Service, Inc. 120 F 3d 1192 74FEP 1883 (11th Cir. 1997).[4] Crawford v. Runyon, 37 F 3d, 1341 (8th Cir '94).[5]

In reference to the decision of Administrative Law Judge F. Lamont Liggett to "Stay" the Agency's action to '609' (reexamine) Gibson's airman certificates, Judge Liggett found that because Mr. Hammonds had been the acting manager of the LAX FSDO, and was well acquainted with the personnel at the LAX FSDO, it was very probable that he had retaliated against Gibson.

On February 12, 1991, Merit Systems Protection Board Administrative Law Judge F. Lamont Liggett telephoned Gibson to tell him that he, Judge Liggett, would probably have to dismiss the "Stay" of the '609' action, issued on November 9, 1990, because, as he explained, the Merit Systems Protection Board in Washington, had held in another case that, an

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[4] "Relying on its earlier decision in Goldsmith v. City of Atmore, 996 F2d 1155 (11th Cir. 1993) the court held that in order to satisfy the "causal link" prong of a prima facie retaliation case, a plaintiff must, at a minimum, establish that the defendant was aware of the plaintiff's protective activity or expression at the time of discharge." Rainey v. Vinson Guard Service, Inc. 120 F3d 1192 74FEP 1883 (11th Cir. 1997).

[5] "Summary Judgment shall seldom be used in employment discrimination cases; Summary Judgment is appropriate only in those rare incidences where there is no dispute of fact and where there exist only one conclusion. Crawford v. Runyon, 37 F 3d, 1341 (8th Cir '94).

appellant filing an appeal under the Whistle Blowers Protection Act '91 (WPA) could not file an appeal as a "Whistle Blower," if the appeal was based on an EEO Complaint. Judge Liggett advised Gibson to let him dismiss the complaint, and, if and when the Agency terminated him, he, Judge Liggett, would hear the case. Judge Liggett assured the petitioner that this decision to dismiss the "Stay" of the '609' action, in no way reflected on the merits of the appellant's allegations, but was only based on the MSPB decision in Washington. Gibson did as he was advised and allowed Judge Liggett to dismiss the complaint. Within a few minutes, Mr. Hammonds was back at Gibson's desk with a new '609' letter which gave him ten (10) days to take the reexamination check ride. (In reference to the record) No additional training, except two flights in preparation for the '609' check ride had ever been offered. When Mr. Hammonds told Gibson that he did not have a future in Flight Standards, he meant it.

In February 1991, an attorney for the Western-Pacific Region's Assistant Chief Counsel's Office, Mr. Monrow Bolton called Gibson at the Fresno FSDO and told him that he would be allowed to take the check ride in Reno, Nevada, but that the <u>same</u> check airman from the Oakland FSDO would be brought in to give the reexamination. Again, there was absolutely no justifiable reason why this FAA Aviation Safety Inspector, from the Oakland FSDO, had to be brought in to Reno to give the check ride, because any other FAA Operations Inspector could have administrated the check ride. Mr. Hammonds <u>falsely</u> testified at the Merit Systems Protection Board termination hearing in September 1991, that the <u>particular</u> check airman, being brought in from the Oakland FSDO, was the "only" check

airman in the entire Western-Pacific Region who could give Gibson the check ride. This testimony was absolutely false and is contradicted by FAA memos and directives, (In reference to the record) which the Merit Systems Protection Board Administrative Law Judge Lon Bartholomew would not allow to be introduced at the termination hearing in September 1991.

The fact that Mr. Hammonds and the Assistant Chief Counsel's office had insisted that the check airman be brought in from the Oakland FSDO, for no justified reason, increased the suspicions of a conspiracy even more. This was especially due to the fact that Mr. Hammonds, Mr. Gibbons, Mr. James Murray, and, the Acting Divisional Manager of Flight Standards for the Western-Pacific Region, Mr. Richard Merriman, had all previously served at the Oakland FSDO at the same time, and were close personal friends.

Petitioner Gibson never refused to take the '609' check ride in the first place, but only asked to be allowed the same privileges as any other FAA certificated airman: a choice of where the FAA '609' check ride would be given. There was never any "probable cause" to any of these actions being taken against Gibson, however, there was strong inference and proof that these actions were highly discriminatory with a strong retaliatory motive.

On August 1, 1992, the petitioner received a "Notice of Proposed Certificate Action," informing him that he had until August 14, 1992 to take the check ride, or, his certificates would be revoked.

Petitioner Gibson has never had an accident, violation, incident, nor any infraction on his FAA Airman's History and Record, however, because he had allegedly

failed out of the FAA Academy, allegedly failed an instrument check ride, and, allegedly committed insubordination, by allegedly refusing to take the '609' check ride, his FAA Airman's Certificates were being "revoked." This was extremely unjust, unprecedented, and, for no probable cause, other than retaliation.

Petitioner Gibson and Norris have submitted a verified, authenticated list of over thirty (30) other FAA Aviation Safety Inspectors whom had failed out of the FAA Academy, only to be returned to their home office for additional training, or, more commonly, retained at the Academy for additional training, and, then recycled through a new class. (In reference to the record and enclosed) Not one other FAA Aviation Safety Inspector who failed out of the Academy was '609'd', terminated, etc., etc. This list of over thirty (30) other Aviation Safety Inspectors who attended the Academy was supplied by FAA EEO Investigators, FAA Inspectors/Supervisors, and, other FAA personnel with firsthand knowledge.

When the FAA's Assistant Chief Counsel of the Western-Pacific Region, Mr. Dewitt Lawson, issued an "Emergency Order of Suspension" of Petitioner Gibson's FAA Airman's Certificates on April 5, 1991, this order stated that the certificate would <u>remain suspended</u> until Gibson satisfactorily passed the '609' check ride. Nothing was ever said about <u>revocation</u> until the "Notice of Proposed Certificate action" was issued on July 29, 1992.

However, on August 14, 1992 the Assistant Chief Counsel served an "Order of Revocation" of all of Gibson's FAA airman certificates. The petitioner immediately appealed this Order of Revocation to the NTSB and a hearing was set for December 1992. When Gibson talked to

the NTSB administrative law judge, assigned to this hearing and was told that he could not call any witnesses to the hearing, he begged and borrowed whatever he could and went ahead and took the '609' reexamination check ride, out of the Western-Pacific Region.

Gibson's FAA Medical Certificate was returned in December 1990, with no restrictions, and, his FAA Airman Certificates were all reinstated in February 1993.

DISCOVERY AND INTERROGATORIES

The causative factors pertaining to the many deliberate, unlawful, personnel actions taken against Gibson and Norris, by supervisory personnel and department heads of the FAA's Western-Pacific Region, could and would have been unquestionably proven if the petitioner's discovery request had been answered, and, if the petitioners had been allowed to call witnesses. The lower court did not require the defendant to answer plaintiff's first set of interrogatories, and, provide requested documents, before granting a Summary Judgment.

See E.G. Poller v. Columbia Broadcasting Systems, Inc., 398 US 464, 473 (1962).[6]

The lower court ruled in the Civil Minute Order on September 30, 1996 that, "Gibson (and Norris) must produce specific, substantial evidence of pretext."

Specific, substantial evidence of pretext was presented and was unquestionably inferred with proof, however, evidently not proven by

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[6] In determining whether Summary Judgment is proper, a court ordinary must look at the record most favorable to the party opposing the motion, drawing all inferences most favorable to that party." E.G. Poller v. Columbia Broadcasting Systems, Inc., 398 US 464, 473 (1962).

clear and convincing evidence, because the petitioner's request for discovery - interrogatories and production of documents, were never answered. A preponderance of evidence was presented and unquestionably proven. See Sischo-Nownejad v. Merced Comm. College Dist., 934 F 2d 1104 (9th Cir. '91).[7] Wards Cove Packing Company v. Antonio, 490 US 642, 109 S CT 211 - 5.[8]

The decision in Sischo-Nownejad v. Merced Comm. College Dist 934 F 2d 1104 (9th Cir. '91) (Footnote:7) regarding evidence, and the granting of summary judgment to the defendant on any ground "relative to the merits," is in direct conflict with the decision of the U.S. Court of Appeals for the Ninth Circuit regarding petitioner's cases CV-92-4522 WDK and CV-94-7069 WDK. Adickes v. Kress

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[7] "The evidence may be either direct or circumstantial, and the amount that must be produced in order to create a prima facie case is very little. (Id at 1009) Normally, when such evidence had been introduced a court should not grant Summary Judgment to the defendant on any ground relative to the merits. Even if the defendant articulates a legitimate, non discriminatory reason for the challenged employment decision, thus shifting the burden to the plaintiff to prove that the articulated reason is pretextual, Summary Judgment is normally inappropriate." Sischo-Nownejad v. Merced Comm. College Dist.934 F 2d 1104 (9th Cir. '91).

[8] "Liberal Discovery Rules give plaintiffs in employment discrimination actions under Title VII of the Civil Rights Act of '64 (42 USCS § 2000e et Seq) broad access to employer's records in an effort to document the plaintiff's claims." See Wards Cove Packing Company v. Antonio, 490 US 642, 109 S CT 211 5.

Company, 398 US at 158 - 159.[9]

The Petitioner's inability to obtain the requested interrogatories and documents, and the fact that no witnesses have ever been allowed to be called by the Petitioners, is the only reason why the Petitioner's have been unable to submit "specific, substantial evidence of pretext," and, this is in direct violation of their Rights under the due process clause of the Fourteenth Amendment, and, the Federal Rules of Civil Procedure, (Rule c & f) 28 U.S.C.F. The evidence that would have been obtained, and, the testimony from witnesses who would have been called, would have definitely produced proven "specific, substantial evidence of pretext." See Hickman v. Taylor, 329 US 495, 67 S CT 385.[10] Celotex Corp. v. Catrett, 477 US 317, 106 S Ct - 2548 (86)[11]

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[9] "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for Summary Judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justified inferences are to be drawn in his favor." Adickes v. Kress Company, 398 US at 158 - 159.

[10] "The disposition-discovery rules (#27-37) of the Federal Rules of Civil Procedure are to be accorded a broad and liberal treatment, to the end that either party may obtain, in advance of trial, knowledge of relevant facts in possession of the other." Hickman v. Taylor, 329 US 495, 67 S CT 385.

[11] "Any potential problem with such premature motions (Summary Judgment) can be adequately dealt with under FED. Rules Civ. Proc. Rule 56 (f) which allows a Summary Judgment motion to be denied, or the hearing for the motion to be continued, if the non moving party has not had an opportunity to make full

The decision by the lower court, which was affirmed by the United States Court of Appeals for the Ninth Circuit is also in conflict with the decision in Crawford v. Britton, 523 US__, 140 L Ed 2d 759, 118 S CT (96-827)[12] and, Anderson v. Liberty Lobby, Inc., 477 US 242, 252 - 255 (1986).[13]

This decision is very comparable to the decision in Crawford v. Britton,523 US __, 140L Ed 2d 759, 118 S CT (96-827) in which the United States Court of Appeals for the District of Columbia held that in an unconstitutional - motive case, against public officials, a plaintiff must prove motive by "clear and convincing evidence."

Assistant U.S. Attorney, Sara Robinson, just briefly referred to the petitioner's request for discovery and first set of Interrogatories, and, merely commented that the defendant would have answered the request if it had been filed "timely."

The defendant has refused to answer the petitioner's discovery request, see US v. Proctor & Gamble Company, 358 US 677, 78 S CT

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discovery." Celotex Corp. v. Catrett, 477 US 317, 106 S Ct - 2548 (86).

[12] "The court of appeals erred in fashioning a heightened burden of proof for unconstitutional - motive cases against public officials." Crawford v. Britton, 523 US__, 140 L Ed 2d 759, 118 S CT (96-827).

[13] "Moreover, the court of appeals indirect effect to regulate discovery employees a blunt instrument that carries a high cost, for its rule also imposes a heightened standard of proof at trial upon plaintiffs' with bonafide constitutional claims." Anderson v. Liberty Lobby, Inc. 477 US 242, 252 - 255 (1986).

983,[14] and the lower court did not enforce the defendant's obligation to answer the plaintiff's request for discovery.

In July or August 1991, shortly after the National Transportation Safety Board hearing held in June 1991, (regarding the Emergency Order of Suspension of Gibson's FAA Airman's Certificates) Gibson called the Northwest Region's Denver FSDO and inquired about taking the '609' reexamination check ride in that region. Gibson spoke with an acquaintance of his at the Denver FSDO, FAA Inspector Walter Wise, and asked him about taking the reexamination check ride somewhere in that region. Inspector Wise reported this request to his operations supervisor, Mr. John Keller, whom had been an instructor at the FAA Academy, and was well acquainted with FAA Academy Supervisor of Flight Training, Mr. Lindsey "Pete" Helquist. Mr. Keller then called Mr. Helquist to find out just what had happened to "Inspector Gibson" when he was a student at the Academy. Mr. Keller, told Mr. Helquist, that Gibson had called the Denver FSDO and was planning to take the '609' check ride somewhere in the Northwest region. (Recall that Mr. Helquist was the last person to fly with Gibson at the FAA Academy on May 25, 1990, and, who then failed Gibson out of the Academy, who refused to allow Gibson to have any additional flight training time at the Academy, and, who sent him back to the Fresno FSDO.

When Mr. Keller told Mr. Helquist of Gibson's plans to take the '609' reexamination check ride in the Northwest Region, Mr.

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[14] "The government as a litigant is subject to the rules of discovery." US v. Proctor & Gamble Company, 358 US 677, 78 S CT 983.

Helquist then began telling Mr. Keller that Gibson had been "falling asleep" while flying aircraft at the Academy; that none of the other instructors at the Academy wanted to fly with him - because they feared he would "fall asleep"; and, that none of the other students wanted to ride in Gibson's personal vehicle because they were afraid he would "fall asleep." These accusations by Mr. Helquist were a complete lie, and, were made to Mr. Keller for no other reason than to negatively affect Gibson's chances at the '609' reexamination check ride. Mr. Keller's statement of this conversation with Mr. Helquist is in the record and enclosed.

FAA EEO Investigator Mr. George Dove, whom conducted a very thorough investigation of the EEO Complaint related to Gibson's termination on April 5, 1991, has stated that he never spoke to anyone at either the LAX FSDO, the Fresno FSDO, or, the Western-Pacific Region headquarters, that ever said or inferred that they had observed the slightest psychological or physical problems with Gibson. Mr. Dove is very willing to testify regarding his findings in support of Gibson.

At the MSPB hearing in September 1991, in regards to Gibson's second termination from the Agency, Mr. Helquist was called as a witness for the defendant and testified telephonically. When the defense attorney finished questioning Mr. Helquist, Gibson then asked Mr. Helquist if he had ever told anyone that he, Gibson, was falling asleep while flying aircraft at the Academy. Mr. Helquist snickered and then answered, "no, I have not." Then Gibson asked Mr. Helquist if he had ever told anyone that none of the other instructors wanted to fly with Gibson because they were afraid he would fall asleep. Mr. Helquist answered, "no, I have not." (In reference to

the record and enclosed)

Mr. Helquist was testifying under oath, and as of this date, has not been called upon to explain his perjured testimony. Mr. Helquist was directly responsible for Gibson being failed out of the Academy and returned to his home office. He could have allowed him to be retained at the Academy for additional refresher training, as all of the other FAA Aviation Safety Inspectors have been. In one class alone, seven of the twelve students failed out of the class, only to be retained at the Academy, or, returned to their home office for additional training. One student had to be given an additional 200 hours of instruction to successfully pass the program, however, they would never be returned to their home office, '609', terminated, etc., etc.

Before an applicant is employed by the FAA as an Aviation Safety Inspector, they must have successfully completed an extensive oral and flight check ride examination, with an FAA Aviation Safety Inspector, and, their application and personnel record - flight history, etc., is thoroughly investigated.

Not one of the personnel actions or charges taken against petitioner Gibson has ever proven to be of any merit or justification. The actions by the defendant were for no other reason than retaliation and reprisal because he had opposed intentional, unlawful racial actions being taken against FAA Inspector James E. Norris.

All of these numerous personnel actions have resulted in gross violations of Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, and, the Federal Rights of both petitions, Gibson and Norris. Their careers in Federal Civil Service have been ruined, and their careers in the field of aviation have been severely, if not

permanently, damaged, all in the name of racial bigotry, hate and retaliation.

Petitioner Gibson has tried in every way to resume his career in the field of aviation, however, because of the negative references on his FAA Aviation History File, his FAA Medical File, and his FAA Employment File, it has been virtually impossible. These actions of retaliation and reprisal have had major affects on both Petitioner Gibson's and Petitioner Norris' career, employment opportunities and family.

CONCLUSION

For the reasons set forth, petitioners respectfully request that the judgment of the United States Court of Appeals for the Ninth Circuit be vacated and remanded for further proceedings and due process with full discovery and witnesses at trial.

Respectfully submitted,

James Franklin Gibson

James Edward Norris, For JFG